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IN THE

Supreme Court of the United States

October Term, 1964

No. 1184

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

MYRON M. SPARBER,
Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013

H. RICHARD UVILLER
MALVINA H. GUGGENHEIM
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

PAGE

STATEMENT 1

ARGUMENT 4

(1) The Coordinating Committee Testimony of Daniel Schliftman 4

(2) Review of the Judgment of Conviction by the Appellate Division, First Department 5

(3) The Motion to Discharge the Jury 7

(4) The Motion to Disqualify the Trial Judge 9

(5) The Contention that the Petitioner was Deprived of His Right to Counsel and Privilege Against Self-Incrimination 12

CONCLUSION 13

APPENDIX A—Plan for Continuous Survey of Retainer Practices of Attorneys in Personal Injury Claims in the First Judicial Department 15

TABLE OF AUTHORITIES

Cases:

Brady v. Maryland, 373 U. S. 83 (1963) 5

De Rosier v. United States, 218 F. 2d 420 (5th Cir. 1955), cert. denied, 349 U. S. 921 12

Escobedo v. Illinois, 378 U. S. 478 (1964) 13

PAGE

Jenkins v. United States, 33 U. S. L. W. 4318 (April 5, 1965) 8

Massiah v. United States, 377 U. S. 201 (1964) 13

McDonald v. Goldstein, 273 App. Div. 649, 79 N. Y. S. 2d 690 (2d Dept. 1948) 11

Shurin v. United States, 164 F. 2d 566 (4th Cir. 1948) 12

United States v. Aronson, 319 F. 2d 48 (2d Cir. 1963) 12

United States v. White, 95 F. Supp. 544 (D. C. Neb. 1951) 12

Other Authorities:

New York Code Crim. Proc. §§22(1), 237, 239, 241, 255 6

New York Code of Criminal Procedure, section 428 .... 7, 8

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RESPONDENT'S BRIEF IN OPPOSITION

Statement

The petitioner, Myon Sparber, was convicted, after trial before a court and jury, of SUBORNATION OF PERJURY IN THE FIRST DEGREE (N. Y. P. L. §1632) and of ATTEMPTED SUBORNATION OF PERJURY (N. Y. P. L. §§2, 1632). The judgment of conviction was unanimously affirmed by the Appellate Division of the New York Supreme Court, First Department (N. Y. L. J. Feb. 19, 1964, p. 16, col. 3), and by the New York Court of Appeals (N. Y. L. J. March 15, 1965, p. 16, col. 1).

The conviction grew out of a survey of the practices of attorneys in the negligence field, conducted by the Coordinating Committee on Discipline, pursuant to an order of the Appellate Division of the New York Supreme Court, First Department, dated February 3, 1959.

The Coordinating Committee on Discipline was established through the joint efforts of the Appellate Division, First Department, and of the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association, to eliminate the unethical and sometimes fraudulent practices, such as ambulance chasing, fee splitting, exaggeration and falsification of claims, that have persisted in the negligence field despite sporadic investigations. Composed of the chairmen of the disciplinary committees of these Bar Associations, and functioning under the supervision of the Presiding Justice of the Appellate Division, First Department, the Coordinating Committee was formed to maintain a continuous survey of the practices of attorneys in the negligence field.*

The Committee proceeded in its task by examining the statements of retainer and closing statements that attorneys are required to file with the court in negligence cases by the Special Rules Regulating the Conduct of Attorneys in the Appellate Division, First Department, and questioning witnesses under oath pursuant to the authority conferred on the Committee by Rule 12 of these rules.

* The plan establishing the Coordinating Committee and outlining its functions is reproduced in pertinent part as Appendix A.

The petitioner had filed as many as 900 statements of retainer in negligence cases in a single year. When the Committee subpoenaed former clients of the petitioner and a doctor who had signed medical reports for a number of his clients, it found its investigation thwarted by evasive, inconsistent, and false answers. When it appeared that criminal conduct by the petitioner might be involved, the Committee notified the District Attorney's Office.

Although the details differed in each instance, the general pattern that emerges from the trial record is as follows: In bringing actions on behalf of persons involved in auto accidents, the petitioner included false claims for personal injury, false claims for loss of earnings, or both, supporting such claims by false medical reports and bills and by false loss of earning statements. All the cases were settled, the petitioner retaining half of the recovery as his fee. When the petitioner learned that he was being investigated by the Committee and that his former clients and one of the doctors who had supplied him with false medical reports had been called as witnesses, he sought and in some instances succeeded in inducing these persons to testify falsely. He, and an associate, Mervin Glassman, who has since been suspended from the Bar for his part in the matter, carefully tutored these prospective witnesses on what they were to tell the Committee, instructing them to falsely state that they had been injured, that they had been treated by a doctor they had in fact never seen, and that they were absent from work and lost several weeks' wages, in some instances from companies for which they had never even worked.

Argument

In his petition for a writ of certiorari Myron Sparber alleges a number of errors which he contends deprived him of his constitutional rights. None of these claims raise a substantial federal question; some are patently frivolous.

(1) The Coordinating Committee Testimony of Daniel Schliftman

Norman Baron, a partner of the Eagle Supply Company, who generally managed the business, hired and fired personnel, and whose name appeared as the signature on a letter submitted to an insurance company by the petitioner in support of a claim on behalf of one, Lewis Rice, certifying that Rice had lost three weeks of wages, testified that he did not sign the letter (2390),* that he did not remember having anyone by the name of Lewis Rice working for the company (2390), and that there was no employee who had sustained injuries and was absent for several weeks during the period claimed (2405-6). He further testified that although Mr. Schliftman, another partner of the company, also had authority to hire and fire personnel, he was certain that Rice was never employed as a salesman by the company (2406). Neither the prosecutor nor the defense called Schliftman as a witness. After reading a transcript of Schliftman's testimony before the Coordinating Committee, the Court denied the petitioner's motion for its disclosure.

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* References, unless otherwise noted, are to pages of the Court Reporter's transcript of the minutes of the trial.

Basing his argument on the decision of this Court in *Brady* v. *Maryland*, 373 U. S. 83 (1963), the petitioner contends it was error for the court not to compel disclosure of the Coordinating Committee's testimony of Daniel Schliftman. That case, however, has no bearing whatsoever on the instant case. In *Brady*, the prosecutor withheld a statement of a co-defendant in which the latter admitted that he was the one who committed the actual homicide. This evidence was particularly significant since the defendant conceded his participation in the felony, but claimed that he did not do the shooting. The Court held that the prosecutor's failure to disclose this exculpatory evidence deprived the defendant of due process. Schliftman's Coordinating Committee testimony, on the other hand, contains no exculpatory evidence; indeed, it contains no reference to Rice at all.* Moreover, the petitioner was fully aware of Schliftman's existence and position as a past partner in Eagle Supply Company and could have called him as a witness if he wished.

(2) Review of the Judgment of Conviction by the Appellate Division, First Department

The petitioner contends that since the Coordinating Committee was established, in part, as a result of the efforts of the Appellate Division, First Department, and its work is under the general supervision of the Presiding Justice of the Appellate Division, First Department, that court acted "as both prosecutor and judge" (brief, p. 15). This claim is utterly baseless.

* A transcript of the testimony was submitted to the Appellate Division and to the Court of Appeals. It will be submitted to this Court, should the Court wish to see it.

First, the Coordinating Committee did not prosecute the petitioner; when its investigation revealed criminal conduct, it brought the matter to the attention of the district attorney, who prosecuted the case. The judgment, although indirectly the result of the Committee's work, was not the decision of that body but of a court and jury, rendered after trial.

Secondly, while the Coordinating Committee derives its authority from the Appellate Division, it functions as an autonomous body. Neither the Presiding Justice, under whose over-all supervision it operates, nor any other member of the court, participates in any manner in its investigations. It is no more an organ of the court than the Federal Communications Commission, or any other agency exercising power delegated to it by Congress, is part of Congress. Moreover, whatever general interest the Appellate Division may have in the work of the Coordinating Committee, would surely not influence its determination of the legality of a verdict against a particular defendant.

Thirdly, even if the Coordinating Committee were to be considered an arm of the Court, the Appellate Court would not be barred from reviewing a judgment rendered after trial before a lower court and a jury, merely because the prosecution arose as a result of an investigation conducted by the Committee. Although the grand jury is traditionally an arm of the court [see e.g. New York Code Crim. Proc. §§22(1), 237, 239, 241, 255] and initiates prosecution by voting its indictment, the court is not barred from reviewing a judgment of conviction based on such indictment.

(3) The Motion to Discharge the Jury

The petitioner contends that the denial of his motion to discharge the jury and of his motion that the court read section 428 of the New York Code of Criminal Procedure to the jury, violated his constitutional rights.

The petitioner was tried under a sixteen count indictment, in a trial lasting eleven weeks, in which 85 witnesses testified, over 100 exhibits were introduced, and over 4,300 pages of testimony, argument and instruction were recorded. As stated by defense counsel in summation, merely to touch upon the many points in the case could take "a week, a month, a year" (3965). Moreover, an understanding of many and intricate legal principles was required for an adjudication of the defendant's guilt or innocence of the crimes with which he was charged. The jury deliberated for a total of four and one-half days—the afternoon of March 29th, March 30th, March 31st, April 2nd, and April 3rd. But, as the court calculated, by midnight of April 2nd the jury had spent only about 35 hours in actual deliberation, or substantially less than one hour for each of the 51 trial days (3201). Considering the mass of evidence and the complexity of the legal issues with which the jury was faced, the time it spent deliberating can hardly be deemed excessive. That the jury was not deadlocked but actually deliberating during this period is evident not only from the absence of a declaration to that effect, but from its continuous requests for exhibits (March 29, 4232-3; April 2, 4297), testimony (March 29, 4232-3; March 30, 4249, 4254), and further instructions (March 29, 4236, 4243; March 30, 4259; March 31, 4265, 4268, 4272, 4289). The jury being deeply engaged in deliberation, the

court very properly denied defendant's motion to discharge it as deadlocked.

Nor was the court required to read Section 428 of the New York Code of Criminal Procedure to the jury. The section provides,

> "After the jury have retired to consider their verdict, they shall be discharged before they shall have agreed therein only in the following cases:
>
> * * *
>
> "(2) When after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict."

This section is a delineation of the court's authority to discharge the jury. It contains no requirement that it be read to the jury and the petitioner's contention that it should be so construed was rejected by the New York Court of Appeals. The question is clearly not one of constitutional dimension.

In *Jenkins* v. *United States,* 33 U. S. L. W. 4318 (April 5, 1965), cited by the petitioner, the jury advised the Court that it was unable to agree on a verdict "because of insufficient evidence." The court nevertheless instructed it, "You have got to reach a decision in this case" (33 U. S. L. W. 4319). The Court held that under the circumstances the statement was coercive. In the instant case the jury never indicated that it was deadlocked before it gave its verdict and the court never instructed it that it had to reach a verdict. That the jury in the instant case was aware that it could declare itself deadlocked, even though the statute was not read to it, is evident from its having done so on a number of counts.

(4) The Motion to Disqualify the Trial Judge

Shortly prior to trial, the defense counsel made a motion to disqualify Judge Sarafite, before whom the case had been moved for trial, on the ground that the petitioner feared the Judge would be hostile. In his argument on the motion, which he quotes in his petition, counsel stated that the petitioner told him that the petitioner's previous attorney had said that if he did not plead guilty he would be tried before Judge Sarafite, that in the atmosphere prevailing in Judge Sarafite's courtroom he would undoubtedly be convicted, and that if he was convicted Judge Sarafite would sentence him to a prison term (Minutes of Jan. 11, 1962, pp. 3-4). Counsel did not substantiate his motion with any facts showing that Judge Sarafite was or might have reason to be hostile or biased to the defendant, nor did he even claim that the Judge was in fact biased. Indeed, he did not share his client's apprehensions. Thus, he stated at the outset, "* * * I, as a lawyer, practicing before the Courts for some 30 odd years, personally feel that you are eminently air [sic], and that I personally feel that a defendant would get a fair trial in your courtroom" (*id.*, p. 2). When Judge Sarafite stated, "The ground for disqualifying the Judge, it seems to me, must be some fact brought home to the Judge, and I take it that there is no claim or allegation here that any of these statements have been brought home to me," counsel assured him, "Positively not" (*id.*, pp. 12-13).

Apparently counsel's position was that since his client intended to testify, he was "entitled to a defendant free of any mental aberration because of the feelings he has

that the District Attorney has selected the judge to convict him" (*id.*, p. 6). It does not require extended argument that a court is not compelled to disqualify himself at the whim of a defendant, unsupported by any facts showing even the possibility of prejudice, bias, or hostility. Obviously, most persons accused of crime would prefer to select the judge before whom they are tried. Equally obviously, such a procedure would be impossible administratively. Since the petitioner failed to show prejudice or the possibility thereof, Judge Sarafite properly denied his motion to disqualify him. In view of counsel's statements to the court before trial, and his failure to cite any instance of bias by the trial judge in his brief for certiorari, his reference to Judge Sarafite as a "hanging judge" (brief, p. 21) is unjustified, and ill-considered in the utmost degree.

It should be noted that the district attorney vehemently denied the petitioner's accusation at the trial and stated that he never told him or his attorney that he would have to go to trial before Judge Sarafite (*id.*, pp. 7, 14). On the contrary, he had anticipated that the trial would not be before Judge Sarafite because Judge Sarafite had several other protracted cases on his calendar, and had moved the case before Judge Schweitzer, who, for reasons which he explained to the district attorney and to defense counsel, declined to take it (*id.*, pp. 7-8). It was only when the other cases on Judge Sarafite's calendar suddenly resulted in pleas, leaving him free, that the district attorney moved the instant case for trial before him (*ibid.*). Nor did the district attorney's offer to permit the petitioner to plead before any judge he chose, openly made on the record, show

that he deliberately forced him to trial before a judge who would convict him, as he claims. It merely shows that since a plea would only have required a few minutes, as opposed to the many weeks that trial of this case required, so that the selection of a judge by the defendant for purposes of a plea was administratively feasible, the district attorney was willing to accommodate him.

On appeal to the New York Court of Appeals, the petitioner also contended that the rule of court which authorizes the District Attorney to move cases for trial was without statutory authority and unconstitutional in that it permits the District Attorney, in the first instance, to select the judge before whom the case is tried.*

In view of the mass of cases tried in New York County, the large number of trial parts and trial assistants, and the frequently changing complexion of each case, of which only the district attorney and the particular defense counsel can be cognizant, it is necessary that the district attorney move cases for trial in the various parts if valuable trial time is not to be uselessly dissipated. Indeed, an alternate procedure was tried in New York County for several years and proved to be unfeasible. See *McDonald* v. *Goldstein*, 273 App. Div. 649, 652, 79 N. Y. S. 2d 690 (2d Dept. 1948). Since the New York Court of Appeals rejected the petitioner's contentions (see Amended Remittitur, petitioner's brief, Appendix B. p. 4a), thus holding the procedure valid under New York law, it is unnecessary

* In New York County a case is assigned to an assistant district attorney who moves it for trial before an available trial part. If the case is not tried the same month, the judge has the option of leaving it in that part, to be tried by whoever sits in that part, or of taking it with him.

to refute the petitioner's long analysis of lower New York cases considering this rule.

The petitioner has cited no case in which a state's calendar practices has been held unconstitutional in the absence of any showing of bias by the trial court or unfairness at the trial. Under federal procedure, crimes committed in more than one district may be prosecuted in any of the districts concerned, at the election of the Attorney General, 18 U. S. C. A. 3237. *De Rosier* v. *United States,* 218 F. 2d 420 (5th Cir. 1955), cert. denied, 349 U. S. 921; *United States* v. *White,* 95 F. Supp. 544 (D. C. Neb. 1951). His selection of the place of trial determines not only the judge, but the rules of court that will govern the trial and, to some extent, the character of the jury. Although a defendant may move for a change of venue if he can show that the transfer would be in the interests of justice, Fed. R. Crim. Proc., Rule 21(b), the granting or denial of the motion is wholly discretionary and reviewable on appeal only upon a showing that the defendant was deprived of a fair trial. *United States* v. *Aronson,* 319 F. 2d 48 (2d Cir. 1963); *Shurin* v. *United States,* 164 F. 2d 566 (4th Cir. 1948). Clearly, the New York procedure is not unconstitutional and in the absence of a showing of bias on the part of the trial judge, the petitioner cannot claim a deprivation of due process.

(5) The Contention that the Petitioner was Deprived of His Right to Counsel and Privilege Against Self-Incrimination.

After several of the petitioner's clients and a doctor who had signed false medical reports for him admitted to the Coordinating Committee that they had testified falsely

at the petitioner's instructions. the district attorney directed them to report to the petitioner on their testimony before the Committee, as he had requested, and to ask him for further instructions, without disclosing that his attempts to suborn perjury had been discovered. The petitioner contends that the use of testimony and recordings of these conversations violates his right to counsel and his privilege against self-incrimination, because suspicion had already focused on him when he made the incriminating statements testified to and recorded. Fantastic as it may seem, the petitioner argues that *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and *Massiah* v. *United States,* 377 U. S. 201 (1964), bar the use in evidence of the incriminating words of a suspect, unguarded by counsel, spoken in the course of and in furtherance of the actual commission of a crime. The absurdity of the proposition is its refutation.

Conclusion

The petition for certiorari should be dismissed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
MALVINA H. GUGGENHEIM
Assistant District Attorneys
Of Counsel

May, 1965

APPENDIX A

Plan for Continuous Survey of Retainer Practices of Attorneys in Personal Injury Claims in the First Judicial Department

Section I

Formation of Coordinating Committee on Discipline

(a) The plan shall be under the overall supervision of the Presiding Justice of the Appellate Division and a committee of three members to be known as the "Co-ordinating Committee on Discipline."

(b) This Committee shall be composed of the chairman of the Grievance Committee of the Association of the Bar of the City of New York, the Chairman of the Committee on Discipline of the New York County Lawyers' Association, and the Chairman of the Grievance Committee of the Bronx County Bar Association.

(c) This Committee shall elect its own chairman and may adopt such rules for the operation of the Plan as it may deem appropriate and desirable.

Section II

Functions and Tasks of the Coordinating Committee on Discipline

(a) With the aid of employees of the Appellate Division who may be assigned to this task by the Presiding Justice, and the aid of the members of the respective Grievance and Discipline Committees of the said three Bar Associations who may be assigned to this task by the Co-

ordinating Committee on Discipline under the general direction of the Presiding Justice, shall examine and make continuous studies based upon the Statements of Retainer and Closing Statements filed by attorneys with the Appellate Division. Among its objectives will be the compilation and interpretation of relevant statistics and data, screening the statements for evidence of possible professional misconduct on the part of attorneys filing same, or possible misconduct of persons collaborating with them, and the development of recommendations calculated to ameliorate or correct any wrongful conditions found to exist in the representation of personal injury claimants.

(b) In any particular case or situation where investigation is deemed advisable by the Co-ordinating Committee on Discipline the said Committee and/or the Court shall conduct an investigation or assign the task of conducting the said investigation to one of the three Grievance or Discipline Committees of the said Bar Association.

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